Case Comments

The Constitutionality of Requiring Use of Husband's Name in Driver's License: *Whitlow v. Hodges*

In *Whitlow v. Hodges*[1] the United States Court of Appeals for the Sixth Circuit rejected an equal protection challenge to the unwritten Kentucky regulation requiring a married woman to receive her driver's license in her husband's surname. The plaintiff had continued to use her maiden name as her legal surname after marriage, and argued that this was permissible under Kentucky law. The Sixth Circuit did not reject the assertion that under Kentucky law Whitlow was entitled to continue to use her maiden name. Nevertheless, the court held that the State of Kentucky could constitutionally require that her driver's license be in her husband's name.

The facts in *Whitlow* are deceptively similar to those in the 1971 three-judge district court decision of *Forbush v. Wallace*,[2] which denied a similar claim and was affirmed by the United States Supreme Court. The Sixth Circuit's resolution of *Whitlow* without a determination of whether Kentucky law requires a married woman to take her husband's surname when she marries, however, fundamentally distinguishes the two cases.

The Sixth Circuit both applied incorrectly the deferential standard of equal protection review it deemed appropriate and failed to recognize that an intermediate standard of review was required because of the sex-based classification under consideration. The application of the fourteenth amendment's equal protection clause, viewed from a historical perspective, has been shaped by an evolving cultural understanding regarding the legitimate roles of various social groups. Rather than recognize the impact of that cultural evolution upon Supreme Court precedent, the court allowed itself to be influenced by the stereotyped views of women that still exist in our society. That influence is evidenced not so much in what the court said, but rather in the questions it failed to consider. The court's analytical failure illustrates the continued impact of culturally determined sexism upon constitutional analysis.

I. FORBUSH V. WALLACE

The plaintiff's claim in *Forbush* was similar to that in *Whitlow*. Forbush challenged on equal protection grounds[3] the constitutionality

1. 539 F.2d 582 (6th Cir.), *cert. denied*, 97 S. Ct. 654 (1976).
2. 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd mem.*, 405 U.S. 970 (1972).
3. The fourteenth amendment of the United States Constitution provides in part: "[N]or

of Alabama's unwritten regulation requiring a married woman to receive an Alabama driver's license in her husband's surname. Unlike the plaintiff in *Whitlow*,[4] Forbush also challenged the constitutionality of the Alabama common-law rule that upon marriage a woman must take her husband's surname as her own. The three-judge federal district court held that neither requirement violated Forbush's fourteenth amendment rights. The United States Supreme Court affirmed without an opinion.

The district court's opinion focused initially on the argument against the validity of the unwritten Alabama regulation governing the name to be used in applying for a license. In assessing the constitutionality of that regulation the court applied the deferential standard of equal protection review.[5] Addressing the deferential standard's requirement that the state action must have a rational relationship to a legitimate state interest, the court identified Alabama's interest as one of "maintaining close watch over its licensees."[6] Having noted that "Alabama has adopted the common-law rule that upon marriage the wife by operation of law takes the husband's surname,"[7] the court reasoned that "[t]he confusion which would result if each driver were allowed to obtain licenses in any number of names he desired is obvious. This would be true not only of the maintenance of driving records, but also of the identification purposes to which a license is put, whether traffic-related or otherwise."[8] Thus, the regulation was found to have a rational relationship to the state's interest in policing the administration of licenses and preserving the integrity of the driver's license as a means of identification.

The court then considered the constitutionality of the common-law rule requiring a woman to abandon her maiden name upon marriage. In that context the court expressly articulated the deferential standard of review: "[A] law is not violative of the Fourteenth Amendment, despite the existence of discrimination in the technical or broad sense, where the law at issue maintains some rational connection with a

shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." The prohibition extends to discriminatory state action in all forms; thus, in *Forbush* the equal protection clause required scrutiny of both the common-law rule requiring a woman to assume her husband's surname upon marriage and the unwritten regulation requiring a woman to apply for a driver's license in her husband's surname.

4. Although Whitlow apparently did not challenge the constitutionality of the alleged Kentucky common-law rule that a married woman must take her husband's surname, she did argue that no such rule existed under Kentucky common law.

5. *See* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: a Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). Gunther indicates that the "deferential 'old' equal protection" was characterized by "minimal scrutiny in theory and virtually none in fact."

6. 341 F. Supp. at 222.

7. *Id.* at 221. Note that at this point in its analysis the court was focusing on the constitutionality of the regulation rather than that of the common-law rule.

8. *Id.* at 222.

legitimate state interest."[9] This deferential standard of review was further evidenced by the district court's statement that "when a court is presented with a challenge to a seemingly valid state law on equal protection grounds, it must sustain that law if it can discern any rational basis."[10]

The state interests served by the common-law rule requiring name change were "[u]niformity among the several states" with regard to "the custom of the husband's surname denominating the wedded couple," and "administrative convenience."[11] The common-law rule that a woman must abandon her maiden name upon marriage, therefore, also passed the deferential standard of review.

In reaching its conclusion the court in *Forbush* also focused on the "simple, inexpensive means"[12] by which a married woman could change her name. The court apparently was noting the fact that although a married woman lost her maiden name by operation of law when she married, she could change her name back to her maiden name by the use of the Alabama name-change statute. The availability of this inexpensive remedy was a significant factor in the court's balancing of the potential administrative inconvenience and cost of a change in procedure to the State of Alabama against the burden on the members of the plaintiff's class. The name-change remedy thus served as the basis for the court's conclusion that the injury to the plaintiff's class, "if any, through the operation of the law is *de minimis*."[13] The court accordingly concluded that the Alabama common-law rule requiring a woman to take her husband's name as her own was not unconstitutional.

II. WHITLOW V. HODGES

A. *The Claim and its Disposition*

Whitlow instituted a class action in the United States District Court for the Eastern District of Kentucky. She alleged that the Kentucky regulation requiring her to receive a driver's license in her husband's surname despite the fact that she continued to use her maiden name for all other purposes violated her fourteenth amendment right to equal protection under law.[14] The district court, relying wholly upon *Forbush*, dismissed the complaint. On appeal to the United States Court of Appeals for the Sixth Circuit, that court re-

9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. There is no indication in the circuit court's opinion that Ms. Whitlow raised a distinct challenge to the constitutionality of the alleged Kentucky common-law rule requiring her to take her husband's surname when she married.

manded the case to the district court for its determination of whether "Kentucky law, like that of Alabama, requires a woman to take her husband's surname upon marriage."[15] As the circuit court indicated, "most of the briefing of the parties and the attention of the court was directed to"[16] that question on the assumption that *Forbush* was controlling only if Kentucky law was like that of Alabama. Upon remand the district court decided that under the common law of Kentucky a woman must abandon her maiden name upon marriage and assume her husband's surname. "The district judge accordingly determined that the two cases [*Whitlow* and *Forbush*] were identical and once more entered an order of dismissal of the complaint."[17]

In an effort to escape the conclusive authority of *Forbush*, Whitlow made a second appeal to the Sixth Circuit to challenge the district court's interpretation of the Kentucky common law and again argued that Kentucky law did permit a married woman to use her maiden name as her legal name.[18] On the second appeal, however, the circuit court rejected its earlier assumption and concluded that a determination of the requirements of Kentucky law was not necessary. The court reasoned:

> [W]e need not determine with finality that the challenged regulation is consistent with the common law of Kentucky, a question which we believe upon the existing state of the law in Kentucky is better left to more definite resolution by the courts of Kentucky. Instead, while *Forbush* is no doubt reinforced by such a finding under the common law of Alabama, we read its primary thrust as directed to the question of whether the challenged regulation has a rational connection with a legitimate state interest.[19]

In answering the question of whether the regulation challenged by Whitlow had a rational connection with a legitimate state interest, the majority asserted that "*Forbush* denied the same claim now being urged by plaintiff in the instance case."[20] That cryptic assertion, however, was an inadequate substitute for genuine analysis of the relevant precedent as applied to these facts.

B. *The Rationale*

Can the rationale of *Forbush* be applied fully and without varia-

15. 539 F.2d at 583.

16. *Id.*

17. *Id.*

18. Among states where the issue has been litigated, Maryland, Ohio, and Wisconsin allow a married woman to continue to use her maiden name. *See* Stuart v. Board of Elections, 266 Md. 440, 295 A.2d 223 (1972); State *ex rel.* Krupa v. Green, 114 Ohio App. 497, 177 N.E. 2d 616 (1961); State *ex rel.* Bucher v. Brower, 21 Ohio Op. 208 (C.P. Montgomery Cty. 1941); *In re* Kruzel, 67 Wis. 2d 138, 226 N.W.2d 458 (1975).

19. 539 F.2d at 583.

20. *Id.*

tion to the facts of *Whitlow*? In addressing this question it will be assumed *arguendo* at this point in the analysis that the deferential standard of review was appropriately employed by the circuit court.[21] The state interests served in *Forbush* by the regulation requiring a married woman to apply for her driver's license in her legal name, which under Alabama law was her husband's surname, should be considered first. The regulation was found to have a rational relationship to both the state interest in policing the administration of the issuance of licenses and the state interest in preserving the integrity of the license as a means of identification. According to the *Whitlow* majority those interests are similarly furthered under the facts in that case. An examination of the facts reveals, however, that Kentucky's interest in preserving the integrity of the driver's license as a means of identification cannot possibly be furthered if Kentucky law permits a married woman to retain her maiden name as her legal name after she marries. It would be repugnant to the interest of preserving the integrity of the driver's license as a means of identification to require an individual to use a name other than the one by which she is legally identified for all other purposes. Nonetheless, by refusing to determine that Kentucky common law required a woman to assume her husband's surname upon marriage,[22] the majority opinion in *Whitlow* necessarily implied that a state regulation requiring a married woman to use her husband's surname on her driver's license rationally relates to the legitimate state interests outlined in *Forbush* even though her legal name is her maiden name and she has made "a showing that for all other purposes [she] continue[s] to use her maiden name."[23]

The dissent concluded:

> Mistakenly following *Forbush*, the majority opinion would hold that Kentucky, which requires a driver to be licensed in his legal name, can rationally require persons in plaintiff's class to be issued licenses in names which under state law are *not* their legal names and by which they have never been known. Accordingly, the state interests found to be determinative in *Forbush* . . . cannot possibly be served by requiring a class of drivers to be issued license in names which are not their legal names, and by which they are not and have never been known.[24]

The pursuit of administrative efficiency and the prevention of fraud in the use of driver's licenses are unquestionably legitimate state interests.[25] The analytical failure of *Whitlow* arises, however, from the

21. The appropriate standard of review is discussed in notes 45-69 *infra* and accompanying text.

22. *See* text accompanying note 19 *supra*.

23. 539 F.2d at 583.

24. *Id.* at 585 (McCree, J., dissenting).

25. After correctly noting that the state interest in preserving the integrity of the driver's license as a means of identification cannot possibly be furthered if plaintiff's legal name is her maiden name, the dissent assumes that the state interest in administrative convenience like-

circuit court's utter disregard of the relationship between the regulation and the interest sought to be achieved. The deferential standard requires that the state action must rationally relate to the interest sought to be achieved.[26] The state interest in preserving the driver's license as a means of identification cannot possibly be furthered by requiring women "to be issued licenses in names which under state law are *not* their legal names and by which they have never been known."[27]

The majority's illogic continued in a reference to the recently amended[28] Kentucky name-change statute, which, "like [the law] of Alabama, affords a simple and inexpensive means of changing one's name."[29] As noted earlier, the majority had not determined that under Kentucky law a woman was unable to continue to use her maiden name after she married.[30] Assuming that Kentucky would allow a woman to retain her maiden name, the court's reference to the name change statute suggests that members of plaintiff's class should "change" their name to what it already is. Carrying the majority's rationale to that extreme, a married female applicant could then still be told that she must apply for and receive her driver's license in her husband's surname.[31]

It is doubtful, however, that the majority would allow the State of Kentucky to require Whitlow to apply in her husband's surname if she had actually employed the name-change statute.[32] That is, if her

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wise cannot be furthered. The state could legitimately argue, however, that it is still administratively more convenient to conclusively presume that the legal name of any married woman is the same as her husband's. In tracing the ownership of a family car, for example, it may be easier for the state to assume that every husband and wife share the same last name. Applying the deferential standard of review, absent any special sensitivity to the impropriety of using sex as a classifying factor, the regulation arguably does further the state's interest in administrative factors. *But see* Comment, *The Right of Women To Use their Maiden Names*, 38 ALB. L. REV. 105 (1973), in which it is suggested that the increasing use of computer technology in matters of identification diminishes the state's need to rely on names.

The entire matter of administrative convenience in the context of sex-based classifications, however, has been rendered largely academic. The Supreme Court has held that administrative factors alone are a constitutionally inadequate justification for disparate treatment of men and women solely on the basis of their sex. Reed v. Reed, 404 U.S. 71 (1971). This authority was completely ignored in *Whitlow*. *Reed* and its progeny are discussed in notes 45-69 *infra* and accompanying text.

26. *See also* Perry, *Constitutional "Fairness": Notes on Equal Protection and Due Process*, 73 VA. L. REV.—(forthcoming 1977).

27. 539 F.2d at 585 (dissenting opinion).

28. In a footnote to the opinion the majority indicated: "Significantly KRS § 401.010 was amended in 1974 by deleting an exception to the name change statute in the case of married women." 539 F.2d at 583.

29. *Id.*

30. *See* text accompanying note 19 *supra*.

31. This result would theoretically follow from the majority's conclusion that it is rational for the state to require a married woman to apply in her husband's surname regardless of whether or not that is her legal name.

32. The court's reference to the name change statute makes sense only if the court means to suggest that the result would be different if she had applied for the driver's license subsequent to her use of the statute.

maiden name were legally hers as a result of having used the statute, she could receive her driver's license in her legal name. The court neglected, however, to provide any explanation of why Whitlow should not be able to apply in her maiden name if she had never taken her husband's name in the first place. If it would be irrational for the state to require her to apply for a driver's license in her husband's surname after she had "changed" her legal name to her maiden name, it is similarly irrational for the state to require her to apply in her husband's surname if her legal name had always been her maiden name.

III. THE ALTERNATIVE STANDARDS OF REVIEW

A. *An Overview*

The analysis of *Whitlow* has thus far assumed *arguendo* that the Sixth Circuit Court of Appeals' application of the deferential standard of review was proper. In employing this standard, however, the court completely ignored the significant doctrinal changes that had occurred after *Forbush* was decided. Had the court in *Whitlow* applied the appropriate standard of review, it would have found a violation of Whitlow's right of equal protection under law.

Traditionally, equal protection doctrine was characterized by a rigid two-tiered approach.[33] A showing of impact upon some fundamental interest[34] or suspect class[35] warranted the application of strict judicial scrutiny. Absent such a showing, the deferential standard was appropriate in all other contexts, including classification on the basis of sex. Both the deferential and strict standards of equal protection review involve a distinct consideration of both the purpose of the challenged law or regulation and the means chosen to achieve that purpose. Consider first the requirements regarding the purpose of the law or regulation. While the deferential standard requires only that the law serve a legitimate state interest—one within the broad sweep of the police power—strict scrutiny requires that the law serve a compelling state interest.[36] With regard to the means chosen to achieve that purpose, the deferential standard requires only that the law or regulation *rationally relate to* the interest sought to be achieved.[37] Strict

33. *See* Gunther, *supra* note 5, at 8.

34. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), in which the Court struck down a poll tax, the payment of which was a precondition for voting.

35. *See* Graham v. Richardson, 403 U.S. 365 (1971), for an example of alienage as a suspect classification warranting strict judicial scrutiny. *But see* Hampton v. Mow Sun Wong, 96 S. Ct. 1895 (1976).

36. For the classic formulation of the strict scrutiny standard of review, see Korematsu v. United States, 323 U.S. 214 (1944). For a more recent statement of the standard, see Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

37. Dandridge v. Williams, 397 U.S. 471, 485 (1970).

scrutiny requires, however, that the law or regulation must do more than relate to that purpose; it must be *necessary* to the achievement of the compelling state interest.

Recent Supreme Court decisions employing an intermediate degree of scrutiny, however, indicate a growing dissatisfaction with the traditional two-tiered approach.[38] The intermediate standard of review now employed in the context of sex-based classification is one indication of this developing standard. The *Whitlow* court did not consider the controlling precedent requiring this intermediate standard of review and, as a consequence, reached an erroneous conclusion.

B. *The Doctrinal Evolution of Sex-Based Discrimination Review*

Before considering the doctrinal developments regarding the standard of review in sex-based classification contexts, it is worthwhile to understand the traditional view of sex-based classifications.[39] As recently as 1948, the United States Supreme Court in *Goesart v. Cleary*[40] sustained the constitutionality of a Michigan statute that in effect forbade "any female to act as a bartender unless she be 'the wife or daughter of the male owner' of a licensed liquor establishment."[41] In answering a claim that the state's disparate treatment of men and women was a violation of the equal protection clause the Court applied the deferential standard. It found a legitimate purpose in the legislative judgment that "bartending by women may . . . give rise to moral and social problems."[42] Because the statute precluded most women from being bartenders, it had a rational relationship to the legitimate state interest: "[T]he line [the state has] drawn is not without a basis in reason. . . ."[43] An indication of the Supreme Court's perception of the validity of sex discrimination claims under the equal protection clause is indicated by the following comment: "To ask whether or not the Equal Protection of the Laws Clause of the Fourteenth Amendment barred Michigan from making the classi-

38. *See* Gunther, *supra* note 5, at 17.

39. The state has used sex as a classifying factor when it has imposed a burden or distributed a benefit on the basis of the gender characteristic. The clearest example of the use of sex as a classifying factor exists when the state expressly employs gender-related language in a statute. In Reed v. Reed, 404 U.S. 71, 73 (1971), the statute provided: "Of several persons claiming and equally entitled . . . to administer, males must be preferred to females, and relatives of the whole to those of the half blood."

40. 335 U.S. 464 (1948).

41. *Id.* at 464.

42. *Id.* at 466.

43. *Id.* at 467.

fication the State has made . . . is one of those rare instances where to state the question is in effect to answer it."[44]

The Supreme Court's doctrinal departure from the deferential standard in the context of sex-based classifications began in 1971 with *Reed v. Reed*.[45] The Court considered an equal protection challenge to an Idaho statute that mandated "preference to the male candidate over the female, each being otherwise 'equally entitled' "[46] to appointment as administrator of the estate of their deceased adopted son. In upholding the constitutionality of the preference scheme the Supreme Court of Idaho had conceded that "the preference given to males . . . is 'mandatory' and leaves no room for the exercise of a probate court's discretion in the appointment of administrators."[47] The objectives of the statute, according to the Idaho Supreme Court, were administrative efficiency and the avoidance of intrafamily controversy.[48] In addressing the deferential standard's requirement that the means chosen must rationally relate to these state objectives the Idaho court reasoned: "This provision of the statute is neither an illogical nor arbitrary method devised by the legislature to resolve an issue that would otherwise require a hearing as to the relative merits as to which of the two or more petitioning relatives should be appointed."[49]

On appeal to the United States Supreme Court the mandatory preference for males was found by a unanimous Court to violate the equal protection clause of the fourteenth amendment. The Court did not dispute the Idaho court's determination that the objective of the statute was to avoid intrafamily controversy and thus to further administrative efficiency. "Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy."[50] Nevertheless, the standard of review employed by the Supreme Court resulted in a determination that the statute was unconstitutional.

What in fact was that standard of review? Sex was not explicitly raised to the level of a suspect class, and no effort was made to analogize sex to race. The Court purported to apply the deferential standard of review: "The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of [the statute]."[51] Ac-

44. *Id.* at 465.
45. 404 U.S. 71 (1971).
46. *Id.* at 73.
47. *Id.* at 74.
48. Reed v. Reed, 93 Idaho 511, 514, 465 P.2d 635, 638 (1970).
49. *Id.*
50. 404 U.S. at 76.
51. *Id.*

cording to one commentator, however, the result reached suggests that

> some special sensitivity to sex as a classifying factor entered into the analysis. Clear priority classifications are plainly relevant to the State's interest in reducing administrative disputes. . . . Only by importing some special suspicion of sex-related means from the new equal protection area can the result be made entirely persuasive.[52]

Despite the Court's failure in *Reed* to adequately explain either the nature of the standard of review employed or the constitutional basis for the special sensitivity to sex-based classifications, *Reed* at least stands for the proposition that the objective of administrative convenience, standing alone, is not sufficient to sustain the disparate treatment of men and women solely on the basis of their sex.

The Supreme Court's doctrinal evolution regarding the appropriate standard of review in sex-based discrimination cases continued in 1973 with *Frontiero v. Richardson*.[53] The plaintiff, a married female member of the armed services, challenged on fifth amendment due process grounds[54] a congressional scheme promulgated to attract career personnel through reenlistment by providing increased allowances for quarters, and medical and dental benefits for members' dependents.

> The problem arose because a serviceman may claim his wife as a 'dependent' without regard to whether she is in fact dependent upon him for any part of her support. . . . A servicewoman, on the other hand, may not claim her husband as a 'dependent' under these programs unless he is in fact dependent upon her for over one-half of his support.[55]

The plaintiff asserted that the statutes were discriminatory in two respects:

> [F]irst, as a procedural matter, a female member is required to demonstrate her spouse's dependency, while no such burden is imposed upon male members; and, second, as a substantive matter, a male member who does not provide more than one-half of his wife's support receives benefits, while a similarly situated female member is denied such benefits.[56]

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52. Gunther, *supra* note 5, at 34.

53. 411 U.S. 677 (1973).

54. *Id.* at 680 n.5: "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.' Schneider v. Rusk, 377 U.S. 163, 168 (1964)." In Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) the Court again indicated the equal protection component of the fifth amendment: "This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *But see* Hampton v. Mow Sun Wong, 96 S. Ct. 1895 (1976).

55. 411 U.S. at 678-79.

56. *Id.* at 680.

In finding the statutory scheme constitutionally invalid four members of the Court[57] concluded, in an opinion written by Justice Brennan, that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny."[58] According to the Brennan opinion, a legislative classification on the basis of sex must therefore be necessary to the achievement of a compelling state interest.

Since *Frontiero*, a majority of the Supreme Court has yet to hold that sex is a suspect class triggering strict scrutiny.[59] Because of the Court's failure to provide a more precise standard of review, the holding in *Reed*, as interpreted in subsequent cases, is crucial to the determination of what standard of review is required in the context of sex-based classification. Although the four justices joining in the Brennan opinion in *Frontiero* found at least implicit support in *Reed* for treating sex as a suspect class, Chief Justice Burger and Justices Powell and Blackmun argued that *Reed* "did not add sex to the narrowly limited group of classifications which are inherently suspect."[60]

That the Court has split on the issue of what label to attach to the degree of scrutiny employed in *Reed*, however, should not overshadow or confuse what had been agreed upon. By joining in the judgment of reversal on the authority of *Reed*, the concurring justices, although refusing to treat sex as a suspect class, demonstrated that the *Reed* standard was not the traditional deferential standard. Although the concurring Justices did not expressly articulate the measure of scrutiny that rendered the congressional scheme in *Frontiero* unconstitutional, the result reached indicates even more persuasively than did the *Reed* result that the standard of review actually employed in reviewing sex-based classifications was more exacting than that utilized under the usual deferential standard. As in *Reed*, absent some special sensitivity to the use of sex-based classifications the congressional scheme would normally have been viewed as bearing a rational relationship to the government's interest in administrative convenience. The three-judge district court had noted:

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57. The four members were Justices Brennan, Douglas, White, and Marshall. Justice Stewart concurred in a one-sentence opinion citing *Reed*. Justices Powell, Blackmun and Chief Justice Burger also concurred in a separate opinion which differed sharply from the Brennan opinion with respect to both the meaning of *Reed* and the appropriate standard of review in the context of sex-based classification: "It is unnecessary for the Court in this case to characterize sex as a suspect classification, with all of the far-reaching implications of such a holding." 411 U.S. at 691-92 (concurring opinion).

58. 411 U.S. at 688.

59. *See* Craig v. Boren, 97 S.Ct. 451 (1976); Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Schlesinger v. Ballard, 419 U.S. 498 (1975); Geduldig v. Aiello, 417 U.S. 484 (1974); Kahn v. Shevin, 416 U.S. 351 (1974); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

60. 411 U.S. at 692 (Powell, J., concurring).

> The classification which establishes a conclusive presumption in favor of married service men claiming wives allows the uniformed services to carry out these statutory purposes with a considerable saving of administrative expense and manpower. Congress apparently reached the conclusion that it would be more economical to require married female members claiming husbands to prove actual dependency than to extend the presumption of dependency to such members.[61]

The concurring Justices, therefore, did not and could not dispute the proposition that the degree of scrutiny employed in *Reed* and in their *Frontiero* analysis was more exacting than that required under the traditional deferential standard of review.

In its most recent decision, *Craig v. Boren*,[62] the Supreme Court further articulated the standard of review required by *Reed*:

> To withstand constitutional challenge, previous cases establish that classifications by gender must serve *important* governmental objectives and must be *substantially* related to achievement of those objectives. Thus, in *Reed*, the objectives of 'reducing the workload on probate courts.' . . . and 'avoiding intra-family controversy,' . . . were deemed of insufficient importance to sustain use of an overt gender criterion in the appointment of intestate administrators. Decisions following *Reed* similarly have rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications.[63]

In a concurring opinion Mr. Justice Powell, while indicating "reservations as to some of the discussion concerning the appropriate standard for equal protection analysis," agreed that "*Reed* and subsequent cases involving gender-based classifications make clear that the Court subjects such classifications to a more critical examination than is normally applied when fundamental constitutional rights and 'suspect classes' are not present."[64] In a footnote to this discussion Mr. Justice Powell continued:

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61. Frontiero v. Laird, 341 F. Supp. 201, 207 (M.D. Ala. 1972) (footnote omitted).

62. 97 S. Ct. 451 (1976). The plaintiffs in *Craig* were a male between the ages of eighteen and twenty-one and a vendor of 3.2% beer who alleged that the Oklahoma statute permitting the sale of 3.2% to women between the ages of eighteen and twenty-one but not to men of the same age, denied them the equal protection of the laws. Because the appellant Craig had turned twenty-one after the Court noted probable jurisdiction, the controversy was mooted as to him. The Court determined, however, that the appellant vendor had standing to make the equal protection claim. The Court held that "the gender-based differential contained in 37 Okla. Stat. § 245 constitutes a denial of the Equal Protection of the Laws to males aged 18-20 . . . ." (footnotes omitted).

63. *Id.* at 457 (emphasis added). In referring to *Reed* and subsequent cases the Court did not articulate a rationale for distinguishing Kahn v. Shevin, 416 U.S. 351 (1974), and Schlesinger v. Ballard, 419 U.S. 498 (1975). In those cases the Court appeared to apply the deferential standard in reviewing governmental practices which remedied the effects of past discrimination, that is, ameliorative classifications. For a discussion of the legitimacy of applying minimal scrutiny in the ameliorative context and stricter scrutiny in the nonameliorative context, see Comment, *The Emerging Bifurcated Standard for Classifications Based on Sex*, 1975 DUKE L.J. 163. The state regulation in *Whitlow* does not evidence an ameliorative classification.

64. 97 S.Ct. at 463-64 (Powell, J., concurring).

> As has been true of *Reed* and its progeny, our decision today will be viewed by some as a 'middle-tier' approach. While I would not endorse that characterization and would not welcome a further subdividing of equal protection analysis, candor compels the recognition that the relatively deferential 'rational basis' standard of review normally applied takes on a sharper focus when we address a gender-based classification. So much is clear from our recent cases.[65]

This intermediate standard has proved problematic for the lower courts. One federal district judge, unaided by the recent decision in *Craig*, candidly remarked that it is "somewhat difficult to surmise what the appropriate standard of review in this case should be."[66] Although the standard is vague, the *Whitlow* court's failure to even address the issue of the appropriate standard of review is an unjustifiable oversight, unworthy of the serious constitutional issue facing the court.

Thus, the holding of *Whitlow* is erroneous in view of the *Reed* intermediate standard of review.[67] The state interests purportedly furthered by the Kentucky regulation were the preservation of the integrity of the driver's license as a means of identification and administrative efficiency. The first interest cannot possibly be furthered by requiring a woman to apply for a driver's license in a name that is not her own. The interest in administrative convenience, assuming *arguendo* that it is plausibly furthered,[68] is simply an inadequate justification for classification on the basis of sex after *Reed* and subsequent cases. A proper application of *Reed* would require a finding of unconstitutionality under the equal protection clause on these facts. For, as stated in *Frontiero*, "any statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative

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65. *Id.* at 464 n.1.

66. Bowen v. Hackett, 361 F. Supp. 854, 861 (D.R.I. 1973).

67. The Supreme Court's summary affirmance in *Forbush* came after *Reed*, and thus one could argue that *Reed* was not controlling on the facts in *Whitlow*. This argument, however, presents several problems. First, the argument does not recognize the fundamental distinction between *Forbush* and *Whitlow*. As was noted earlier, unlike the district court in *Forbush*, the *Whitlow* majority did not first determine that Kentucky law required a woman to take her husband's surname.

Second, although the Supreme Court's summary affirmance of *Forbush* in 1972 came after *Reed*, the district court's opinion relied upon by the *Whitlow* court was written without the benefit of *Reed*. Thus, although *Reed* was soon to hold that the objective of administrative efficiency was an impermissible basis for classification on the basis of sex, the *Forbush* district court could still write that "[a]dministrative factors have often been considered rational bases for challenged statutes." 341 F. Supp. at 222 n.2.

Third, the full significance of *Reed* was not apparent when *Forbush* was summarily affirmed. The Court had not yet decided *Frontiero*, which made clear that the degree of scrutiny employed in *Reed* was more exacting than the usual deferential standard. Thus, although "lower courts are bound by the summary decisions" of the Supreme Court, 539 F.2d at 584, the court in *Whitlow* was not bound by a summary affirmance that was factually distinguishable and was decided prior to a fundamental change in the degree of scrutiny employed in the review of sex-based classification.

68. *See* note 25 *supra*.

convenience, necessarily commands 'dissimilar treatment for men and women who are . . . similarly situated,' and therefore involves the 'very kind of arbitrary legislative choice forbidden by the [Constitution]. . . .' "[69]

IV. CULTURAL NORMS AND CONSTITUTIONAL ANALYSIS

A. *Background*

Constitutional law has not been immune to the impact of evolving cultural norms regarding the appropriate roles of various social groups. Commenting on *Brown v. Board of Education*[70] in a later case, Justice Douglas wrote:

> In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. . . . Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change. This Court in 1896 held that laws providing for separate public facilities for white and Negro citizens did not deprive the latter of the equal protection and treatment that the Fourteenth Amendment commands. . . . Seven of the eight Justices then sitting subscribed to the Court's opinion, thus joining in expressions of what constituted unequal and discriminatory treatment that sound strange to a contemporary ear. When, in 1954—more than a half-century later—we repudiated the 'separate-but-equal' doctrine of *Plessy* as respects public education we stated: 'In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written.'[71]

The application of the equal protection clause in the racial context, then, is a function of the way the definition of racism is evolving in our society.

The relationship between changing cultural norms and equal protection doctrine in the context of classifications based upon sex parallels that of racial classifications. In the 1873 case of *Bradwell v. Illinois*[72] the Supreme Court was faced with a fourteenth amendment challenge to the Illinois Supreme Court's refusal to admit a woman to

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69. 411 U.S. at 690. A thorough critique of the *Forbush* conclusion sustaining the constitutionality of the Alabama common-law rule requiring name change is beyond the scope of this paper. It is submitted, however, that the state interests served by that common-law rule, custom and administrative convenience, are constitutionally inadequate justifications after *Reed* and its progeny. Most forms of sex discrimination not only serve custom, they are an expression of custom. To argue that sex-based classifications are constitutionally permissible because they further custom is merely another way of stating that it is permissible to discriminate because the discrimination has continued for many years. The logic is not persuasive. Moreover, as noted earlier, *Reed* made clear that administrative convenience is no longer a sufficient justification for classification on the basis of sex.

70. 347 U.S. 483 (1954).

71. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 669-70 (1966) (footnotes omitted).

72. 83 U.S. (16 Wall.) 130 (1873).

the practice of law in that state. The extent of the transformation of our normative values as a culture, and the Supreme Court's participation in that evolution, is indicated by a comparison of the *Bradwell* opinion with some of more recent vintage. In upholding the constitutionality of the exclusion of women from the practice of law the Court explained:

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.[73]

In sharp contrast to *Bradwell*, the Brennan opinion in *Frontiero* expressly noted the evolution in our collective perception of the role of women:

> There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage.[74]

As evidence of the degree to which this paternalistic attitude had become "so firmly rooted in our national consciousness"[75] the *Frontiero* opinion included the passage quoted above from the *Bradwell* opinion. The opinion continued:

> As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. And although blacks were guaranteed the right to vote in 1870, women were denied even that right—which is itself 'preservative of other basic civil and political rights'—until adoption of the Nineteenth Amendment half a century later.[76]

This historical similarity between the disadvantaged position of blacks and women was a crucial factor in Justice Brennan's determination that "classifications based upon sex, like classifications based upon

73. *Id.* at 141.

74. 411 U.S. at 684 (footnote omitted).

75. *Id.*

76. *Id.* at 685 (footnote omitted).

race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny."[77] Although recent decisions raise serious doubts about the prospects that a majority of the Court will elevate sex to the status of other suspect classes,[78] the recognition of evolving cultural norms in the intermediate level of scrutiny is clear.

B. Whitlow *Reconsidered*

The *Whitlow* opinion can be appropriately reconsidered in the light of these evolving cultural norms and their impact upon equal protection analysis. The significance of the majority's approach lies not in its meager analysis, but rather, in the questions it failed to consider and the reasons for that failure. The majority's approach reflects a regrettable inability to guard against the traditional cultural biases affecting its analysis and a failure to recognize the impact of evolving cultural norms in the controlling precedent.

As indicated earlier, the *Whitlow* majority completely ignored the intermediate standard of review required by *Reed* and its progeny.[79] This failure to consider the controlling precedent is especially surprising in light of the Sixth Circuit's prior recognition that the intermediate standard should be employed in sex discrimination cases.[80]

A conceivable explanation for this failure may be that the majority also failed to consider whether Whitlow's claim actually involved a sex-based classification. Although the issue of what constitutes a sex-based classification has been difficult to resolve in other factual contexts,[81] it is indisputable that in *Whitlow* the state had classified

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77. *Id.* at 688.

78. *See* cases cited in note 59 *supra.*

79. *See* text beginning at note 45 *supra.*

80. *See* Tanner v. Weinberger, 525 F.2d 51, 54 n.2 (6th Cir. 1975):

> In recent years the Court appears to have moved away from the rigidity of these two tests [the deferential standard and strict scrutiny] and to be evolving a newer standard of review requiring somewhat more than a rational basis and less than a compelling governmental interest to sustain certain classifications. This new standard focuses upon the means used to effect the end.

The court then cited Reed v. Reed, 404 U.S. 71 (1971), as an example of the intermediate standard of review.

81. *See, e.g.*, Geduldig v. Aiello, 417 U.S. 484 (1974), in which the Court held that the State of California could constitutionally exclude pregnancy from the broad range of disabilities covered by its disability insurance system. The Court attempted to distinguish *Reed* and *Frontiero* as

> involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed* . . . and *Frontiero.*

Id. at 496 n.20.

The Court recently reaffirmed the significance of this language by focusing upon "gender

on the basis of sex. The unwritten regulation required married women "to make application for and receive a motor vehicle operator's license in the surname of her husband despite a showing that for all other purposes the woman has continued to use her maiden name."[82] A man, married or single, may apply for and receive a driver's license in his legal name. A woman, however, must apply for and receive a driver's license in her husband's surname even if that is not her legal name. It would be difficult to find a more clear-cut example of classification on the basis of sex. [83]

It is also conceivable that the court's analytical failure grew out of its unconsidered approach to the interest Whitlow sought to protect.[84] Is a woman's interest in retaining her maiden name upon marriage or in applying for a driver's license in that name of any real significance?[85] Before approaching that question, consider the manner in which our nation's evolving definition of racism enables us to see now the absurdity of an earlier Supreme Court view of a black person's interest in avoiding forced segregation.

The classic formulation of the separate-but-equal doctrine appeared in *Plessy v. Ferguson*,[86] in which the Court rejected an equal protection challenge to a Louisiana law requiring equal but separate accommodations for white and black railroad passengers.[87] Addressing the legitimacy of a black person's interest in integrated railroad transportation, the Court reasoned:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is

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as such" in General Electric Co. v. Gilbert, 97 S. Ct. 401 (1976). In *Whitlow*, Kentucky has classified on the basis of "gender as such."

82. 539 F.2d at 583.

83. In Forbush v. Wallace, 341 F. Supp. 217, (M.D. Ala. 1971), *aff'd mem.*, 405 U.S. 970 (1972), the court noted: "Thus, we are faced with a similar question of whether a state may impose a burden on one sex that it does not place on the other."

84. Mr. Justice Marshall has persuasively argued:

> A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.

San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting).

85. *See generally*, Lamber, *A Married Woman's Surname: Is Custom Law?*, 1973 WASH. U.L.Q. 779 (1973); MacDougall, *The Right of Women to Determine Their Own Names Irrespective of Marital Status*, 1 FAM. L. REP. (BNA) 4005 (Dec. 10, 1974); Comment, *The Right of Women to Use Their Maiden Names*, 38 ALB. L. REV. 105 (1973); Statutory Development, *Pre-Marriage Name Change, Resumption and Reregistration Statutes*, 74 COLUM. L. REV. 1508 (1974); Comment, *Women's Name Rights*, 59 MARQ. L. REV. 876 (1976); Comment, *The Right of a Married Woman to Use Her Birth-Given Surname for Voter Registration*, 32 MD. L. REV. 409 (1973); Comment, *A Woman's Right To Her Name*, 21 U.C.L.A. L. REV. 665 (1973).

86. 163 U.S. 537 (1896).

87. *Id.* at 540.

> not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.[88]

To focus solely on the absurdity of that view, however, is to avoid the important lesson that can be discerned from this facet of constitutional history. The judiciary is not immune from the impact of culturally shared normative values. It is the very nature of cultural bias that the interest sought to be advanced will, when first considered, appear insignificant or unworthy of serious constitutional consideration. The Supreme Court's immersion in our nation's nineteenth century racism had allowed it to conclude that forced segregation was evil only because blacks chose to define it in that light.

Our perception, then, of a married woman's interest in maintaining an independent social and legal identity by retaining her maiden name should be aided by a recognition that the societal majority's perception of the importance of a minority interest is often disparaging. Thus, in light of *Plessy*, it should not be surprising when it is argued that a mandatory change of name is discriminatory only because a few women choose to view it as such.

One commentator has suggested that "[u]ntil there is the acknowledgment that the right to retain a maiden name symbolizes many principles inherent in the movement of women's rights, maiden names will continue to be thought of as an insignificant problem within the larger framework of sex discrimination."[89] What exactly is the symbolic function of a maiden name?

> The married woman in modern America who wishes to retain her maiden name, or to use the title Ms. instead of Mrs., is generally making, and is understood by most people to be making, a statement that she rejects certain aspects of the traditional female role or stereotype. She appears to be stating that it is her wish to be considered as an individual, in her own right, and that she does not choose to be defined in terms of her relationship with another person. No matter how important such a relationship may be, she does not feel that it should define her identity.[90]

Regardless of whether most women would prefer to retain their maiden names, or whether one personally agrees with the motivation for such an effort, the matter is of paramount significance for those women who do desire to maintain that name as a symbol of personal autonomy.

The reasoning implicit in this desire to use the maiden name as a symbol of autonomy is understandable in light of historical justifica-

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88. *Id.* at 551.

89. Comment, *The Right of Women To Use Their Maiden Names*, 38 ALB. L. REV. 105, 124 (1973).

90. Comment, *A Woman's Right To Her Name*, 21 U.C.L.A. L. REV. 665, 684 (1973) (footnotes omitted).

tions for requiring a woman to abandon her own name upon marriage. The common-law rule that a woman take her husband's surname as her legal name developed

> as an outgrowth of the judicial doctrine of coverture which decreed that a married woman had no legal identity apart from that of her husband. This doctrine was based on the fiction that husband and wife are one. That 'one' was deemed to be the husband. The married woman, or *femme covert*, lacked the capacity to contract, to sue or be sued, or to possess or control property. To reflect the merger of her separate identity into that of her husband, the law conferred her husband's name upon her.[91]

The adoption of the Married Women's Acts alleviated many of these barriers, but "left unaffected the practice that symbolized that unity: the rule that upon marriage the wife takes her husband's name."[92]

V. CONCLUSION

Some married women wish to retain their maiden names as a symbol of their rejection of the traditional legal status accorded women and as a symbol of their own personal autonomy in the marital relationship. Although the Sixth Circuit's opinion in *Whitlow v. Hodges* does not indicate whether Whitlow had retained her maiden name for this reason, the court's rejection of her claim is a serious setback to women who desire the freedom to make that choice.

The court's conclusion is especially troublesome because of its failure to ground the decision on a common-law rule requiring a woman to assume her husband's surname. The court refused to determine whether Kentucky required abandonment of the maiden name upon marriage and implicitly suggested, therefore, that Whitlow's maiden name might be legally hers under Kentucky law. Nevertheless, the court held that the State of Kentucky could constitutionally require Whitlow to receive her driver's license in her husband's surname.

In reaching this decision the court merely assumed that the rationale of *Forbush v. Wallace* could be applied to the instant case. A cursory examination of that rationale, however, reveals that Kentucky's interest in preserving the integrity of the driver's license as a means of identification cannot possibly be furthered by requiring women to apply for drivers' licenses in names that are not their own. The court also failed to evaluate the precedential value of *Forbush* in light of subsequent Supreme Court decisions that require the application of an intermediate level of scrutiny in the context of sex-based classifications.

Rather than recognize the impact of our culture's evolving atti-

91. *Id.* at 666 (footnotes omitted).

92. *Id.* at 667 (footnote omitted).

tude concerning the legitimate roles of women upon Supreme Court precedent,[93] the Sixth Circuit apparently assumed that the interest Whitlow sought to protect was unworthy of serious constitutional consideration. It is not inconceivable that years from now this case will be read as social historians now read *Plessy*. The subtlety of cultural bias is so powerful that a male-dominated federal court has refused to strike down state action requiring women to be identified through their relationships to men. It is indeed ironic that such a decision should occur after a fundamental change in equal protection doctrine concerning classifications on the basis of sex. If that doctrine had been carefully considered, the result would necessarily have been different.

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93. The impact of evolving normative roles upon equal protection analysis was again evidenced in Califano v. Goldfarb, 45 U.S.L.W. 4237 (1977), which was decided after completion of this Case Comment. Justices Brennan, White, Marshall, and Powell concluded that the provision of the Social Security Act which required widowers but not widows to prove actual dependency in order to qualify for survivor's benefits after the spouse's death violated female wage earner's right to equal protection guaranteed by the fifth amendment due process clause by providing less protection for their families than for the families of male workers. Justice Stevens, concurring in the judgment, concluded that the statutory scheme worked an unconstitutional discrimination against male spouses, rather than against deceased female wage earners. Writing for the plurality, Justice Brennan noted that the gender-based disparity in treatment "is forbidden by the Constitution, at least when supported by no more substantial justifications than 'archaic and overbroad' generalizations . . . or 'old notions' . . . that are more consistent with 'the role-typing society has long imposed' . . . than with contemporary reality." *Id.* at 4239 (citations omitted).